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IN THE

Supreme Court of the United States

October Term, 1950. 51

No. 62

HALCYON LINES AND VINKE AND COMPANY,
Petitioners,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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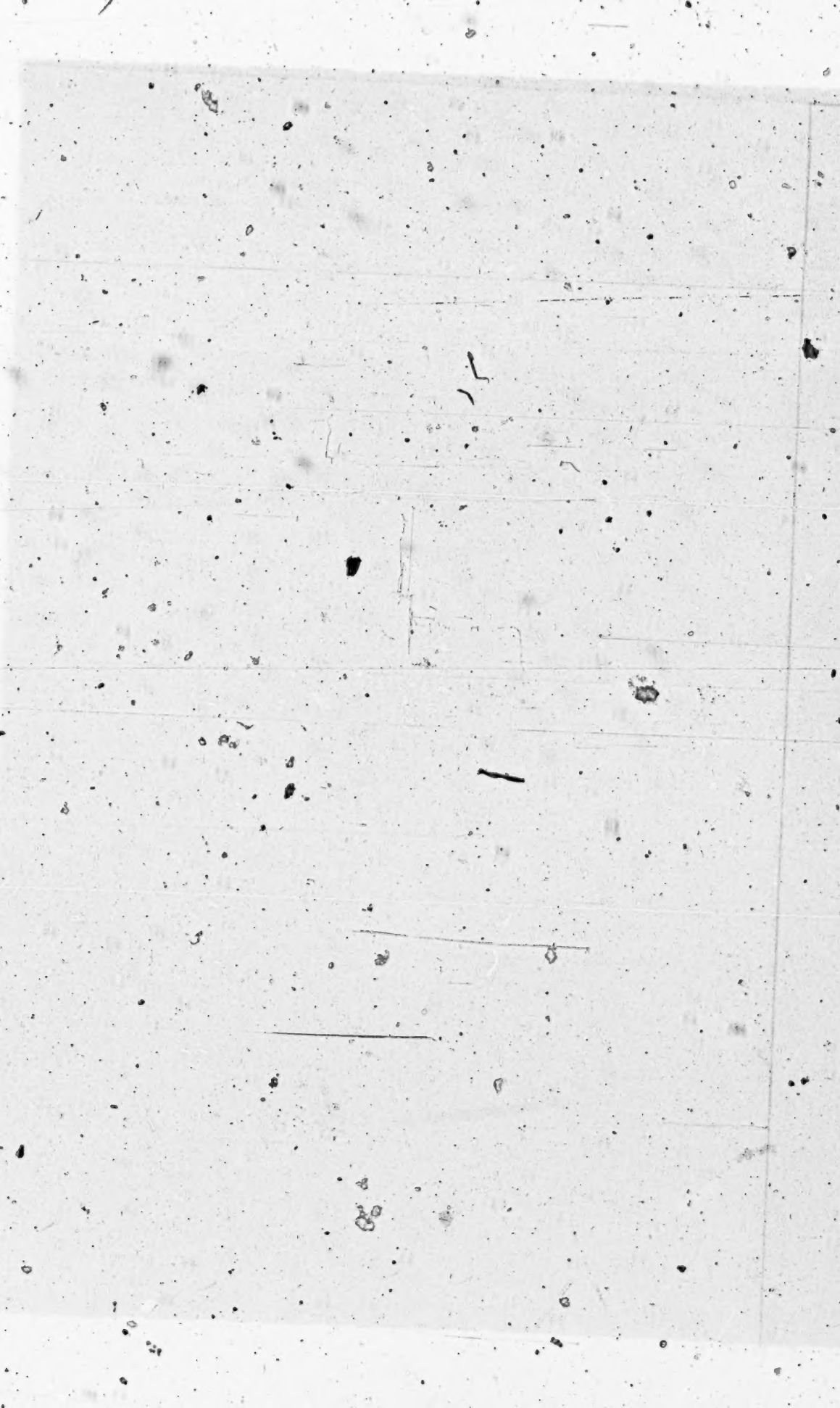

TABLE OF CONTENTS OF PETITION.

	Page
Summary and Statement of Matter Involved	1
Jurisdiction	5
Opinions Below	5
Questions Presented	5
Reasons for Granting the Petition	6

TABLE OF CASES CITED IN PETITION.

	Page
American Mutual Liability Ins. Company v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950)	6, 7, 8
American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947)	8
Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. C. A. D. of C. 1950) cert. den. 340 U. S. 852	6, 7
Liberty Mutual Insurance Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D. of C. 1950)	8
Slattery v. Marra Bros., Inc., 186 F. (2d) 134 (C. C. A. 2d, 1951)	7
Spaulding v Parry Nav. Co., 187 F. (2d) 257 (C. C. A. 2d, 1951)	7
United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950)	6, 7

TABLE OF CONTENTS OF BRIEF.

	Page
Argument	11
I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Limited by the Extent to Which an Employer Might Otherwise Be Required to Pay Compensation to the Plaintiff	11
(a) The Act Does Not Limit the Amount of Contribution to Be Paid by a Joint Tort Feasor in a Maritime Cause of Action	12
(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court	15
Conclusion	17

TABLE OF CASES CITED IN BRIEF.

	Page
American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950)	12
American Stevedores, Inc. v. Porello, 330 U. S. 446 (1947)	16, 17
Explorer, The, 20 Fed. 135 (C. C. E. D. La. 1884)	16
Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239 (1942)	15
Guerrini v. United States, 167 F. (2d) 352 (C. C. A. 2d, 1948) cert. den. 335 U. S. 843	16
Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. of A. D. of C. 1950) cert. den. 340 U. S. 852	12, 13, 14
Kreste v. United States, 158 F. (2d) 575 (C. C. A. 2nd, 1946)	16
Liberty Mutual Ins. Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D. of C. 1950)	13
Max Morris, The, 137 U. S. 1 (1890)	16
Portel v. United States, 85 F. Supp. 458 (D. C. S. D. N. Y. 1949)	14, 16, 17
Rederii v. Jarka Corporation, 26 F. Supp. 304 (D. C. Me. 1939)	14
Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 431 (1939)	16
Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88 (1946)	15
Slattery v. Marra Bros. Inc., 186 F. (2d) 134 (C. C. A. 2d, 1951)	12
Spaulding v. Parry Nav. Co., 187 F. (2d) 257 (C. C. A. 2d, 1951)	13
S. S. Samovar, The, 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947)	14
Stokes v. United States, 144 F. (2d) 82 (C. C. A. 2nd, 1944)	16
Tampico, The, 45 F. Supp. 174 (D. C. W. D. N. Y. 1942)	14
United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950)	12, 14

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No.

HALCYON LINES AND VINKE AND COMPANY,
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HAENN SHIP CEILING AND REFITTING CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Halcyon Lines and Vinke and Company, owners and operators of the Dutch steamship STAD VLAARDINGEN, respectfully pray that writs of certiorari be issued to review the final judgments of the United States Court of Appeals for the Third Circuit entered on February 21, 1951 in appeals docketed in said Court as No. 10,213 (appeal by the respondent herein) and No. 10,219 (appeal by the petitioners herein) (R. 190, 191), each final judgment reversing the same judgment of the United States District Court for the Eastern District of Pennsylvania (R. 189, 190, 191).

Summary and Statement of Matter Involved.

This is a civil action to recover damages for personal injuries under the general maritime law brought by Salvadore Baccile, an employee of Haenn Ship Ceiling and Refitting Corporation, (hereinafter for the sake of brevity referred to as "Haenn"), against Halcyon Lines and Vinke and Company, (hereinafter for the sake of brevity referred

to as "Halcyon"), the owners and operators of the Dutch Steamship STAD VLAARDINGEN (Rp.* 4, Rr. 6).

The defendants filed a third-party complaint against Haenn, the plaintiff's employer, claiming contribution or indemnity (Rp. 11, Rr. 13).

On November 25, 1946 while the vessel was moored at Girard Point, Philadelphia, Haenn, plaintiff's employer, an independent contractor, was engaged by Halcyon to make repairs to grain fittings in the holds of the vessel which had been installed therein for the carriage of a cargo of grain from Montreal to Rotterdam, at which port she discharged her cargo and sailed in ballast to Philadelphia. The grain fittings had been damaged during the carrying and discharging of the cargo carried from Montreal to Rotterdam (Rp. 22, Rr. 156).

On the day of the accident a representative of plaintiff's employer and the surveyor for the New York Board of Underwriters, as arranged by the ship's agents, attended on board to determine the nature and extent of work required to be done on the grain fittings in order to receive the approval of the surveyor. It was found that the burlap lining on the inside of the grain feeder built in No. 2 hatch had been torn and required replacing (Rp. 22, Rr. 156). In the late afternoon of November 25, 1946, plaintiff and a fellow workman were engaged in the work of replacing the burlap in this feeder and in doing so they entered the feeder from the main deck of the vessel by placing an extension ladder (which, however, was not extended), the property of Haenn, the third-party defendant, on a plank which was running fore and aft in the bottom of the feeder near the 'tween deck. This plank was placed in the feeder by those who built the feeder in Montreal and was used in connection with its construction, but was not a part of the feeder and

* The record in this case consists, inter alia, of the Appendix in the Court-below in the aforesaid Appeal No. 10,219 which Appendix shall hereafter be referred to by the symbols "Rp." and of the Appendix in the Court-below in the aforesaid appeal No. 10,213 which Appendix shall hereafter be referred to by the symbols "Rr.". The symbol "R." shall refer to the record printed subsequent to the aforesaid appendices.

was unnecessary to the purpose of the feeder (Rp. 23, Rr. 157, Rp. 41, Rr. 175, Rp. 44, Rr. 178). While the ladder was resting on the plank, the plaintiff descended it, stepped from the plank onto one of the ship's steel beams and thence again onto the plank to the rear of the ladder and walked on the plank to the end thereof which was against the after part of the feeder. The plank came free of its fastenings; and the ladder resting on it, the plank itself, and the plaintiff fell to the lower hold, a distance of about thirty (30) feet, resulting in serious and permanent injuries to the plaintiff.

On November 21, 1949, the case was called for trial before the Hon. James P. McGranery. Before proceeding to trial, counsel for all of the parties agreed that the plaintiff was entitled to recover $65,000, and, in accordance with stipulation made in open court, a judgment was entered in favor of the plaintiff in that amount.

The case then proceeded to trial on the issue between Halcyon, as third-party plaintiffs, and Haenn, as third-party defendant, as to whether either or both were guilty of negligence causing the plaintiff's injuries. Halcyon contended that Haenn was negligent in not properly inspecting the plank in the bottom of the grain feeder on which the ladder was rested, in performing the work in an unsafe manner when it could have been done by other methods without danger of injury to the plaintiff, and in failing to furnish the necessary safe appliances and equipment with which to perform the work. Haenn contended that it was not negligent and that the representatives of the vessel gave no notice to the plaintiff of the unsafe condition of the plank.

In order to determine these issues, the trial Court submitted to the jury certain interrogatories, the answers to which were to constitute a special verdict (Rp. 38, Rr. 172). In effect, these interrogatories required the jury to answer affirmatively or negatively as to whether either Halcyon or Haenn or both was or were negligent so as to contribute

substantially to the plaintiff's injuries. The jury found that both were negligent.

In response to the interrogatory as to the percentage of negligence of the respective parties, the jury answered that Halcyon was twenty-five per cent. (25%) negligent and Haenn was seventy-five per cent. (75%) negligent (Rp. 38, 39, Rr. 173).

Halcyon thereupon moved the trial court, on the basis of the jury's answers, to enter judgment in favor of Halcyon against Haenn in the sum of $48,750 on which motion the trial Judge reserved action (Rp. 4, Rr. 174). Haenn filed Motions for New Trial and for Judgment N. O. V. and for Molding the Verdict.

On April 3, 1950, after argument, the District Court filed an Opinion and Order dismissing Haenn's Motions for Judgment N. O. V. and for a New Trial and entered judgment in favor of Halcyon against Haenn, in the amount of $32,500, which is fifty per cent. (50%) of the amount paid to the plaintiff by Halcyon in accordance with the stipulation of counsel before the trial (Rp. 46, Rr. 180). Both Halcyon and Haenn appealed to the United States Court of Appeals for the Third Circuit, Haenn in Appeal No. 10,213 because of the judgment against it, and Halcyon in Appeal No. 10,219 because of the action of the District Court in altering the jury's verdict.

Argument was heard on both appeals, and on February 21, 1951, the United States Court of Appeals for the Third Circuit in an opinion by Circuit Judge Kalodner ruled that Haenn was negligent and had a liability over to Halcyon but that such liability was limited to the amount of compensation payable by Haenn to the plaintiff had he elected to receive compensation under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. § 901 et seq.) and accordingly in each of the aforesaid appeals reversed the judgment of the District Court. (R. 189)

Judgment in each appeal was entered on February 21, 1951 (R. 190, 191).

This petition for writs of certiorari is presented to review the aforesaid decision of the United States Court of Appeals in each of the aforesaid appeals.*

Jurisdiction.

The judgments of the United States Court of Appeals for the Third Circuit were each entered on February 21, 1951 (R. 190, 191).

The jurisdiction of this Court to entertain this petition and to grant the same is provided in Section 1254 (1) and Section 2101 (c) of Title 28 of the United States Code and by Rule 38, par. 5 (b) of the Supreme Court of the United States.

Opinions Below.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed April 3, 1950, appears on Rp. 41 to 46, inclusive, and Rr. 175 to 179, inclusive, of the record and is reported in 89 F. Supp. 765. The opinion of Circuit Judge Kalodner of the United States Court of Appeals for the Third Circuit, filed February 21, 1951, appears on R. 183 to 189, inclusive, of the record and is reported in 187 F. (2d) 403.

Questions Presented.

The plaintiff, an employee of an independent contractor who had been engaged to repair grain fittings in a vessel, sued the shipowners and operators in a civil action to recover damages under general maritime law for personal injuries sustained while engaged in making such repairs. The shipowners and operators joined the plaintiff's employer as a third-party defendant alleging that it was either solely liable or liable for contribution to any judgment attained against them by plaintiff. At the trial the jury found by special verdict in respect to interroga-

* Petitioners have been informed that a petition for writs of certiorari is also being filed by Haenn Ship Ceiling and Refitting Corporation.

tories that both were negligent and that the negligence of the shipowners and operators contributed twenty-five per cent. (25%) to the plaintiff's injury and the negligence of the plaintiff's employer contributed seventy-five per cent. (75%) thereto. The District Court then entered judgment in favor of the shipowners and operators for contribution from the plaintiff's employer on the basis of equal fault rather than upon the percentage of fault found by the jury. The United States Court of Appeals for the Third Circuit, reversed this ruling and held that the contribution of the plaintiff's employer was limited to the extent of compensation which would have been payable to the employee under the Longshoremen's and Harbor Workers' Compensation Act.

1. Did not the United States Court of Appeals err in limiting contribution to the extent that compensation would have been payable to the plaintiff by his employer under the Longshoremen's and Harbor Workers' Compensation Act?

2. Did not the District Court err in entering a judgment for contribution on the basis of equal fault rather than the percentage of fault found by the jury?

Reasons for Granting the Petition.

The petition should be granted because:

1. The decision of the United States Court of Appeals for the Third Circuit is in conflict with the decisions of the United States Courts of Appeals for the Second Circuit, for the Ninth Circuit, and for the District of Columbia in the following cases:

American Mutual Liability Ins. Co. v. Matthews, 182 F. (2d) 322 (C. C. A. 2d, 1950);

United States v. Rothschild International Stevedoring Co., 183 F. (2d) 181 (C. C. A. 9th, 1950);

Hitaffer v. Argonne Co., 183 F. (2d) 811 (C. C. A. D. of C. 1950), cert. den. 340 U. S. 852.

In the *American Mutual Liability Ins. Co. v. Matthews, supra,* the shipowner was denied any contribution whatsoever from the longshoreman's employer.

In *United States v. Rothschild International Stevedoring Co., supra,* the shipowner was granted full indemnity against the stevedoring company.

In *Hitaffer v. Argonne Co., supra,* the wife of an employee was permitted to recover damages from her husband's employer for loss of consortium, notwithstanding the payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act.

In the instant case, the contribution payable to the shipowner has been limited to the amount of compensation which the stevedoring company would have been required to pay its employee under the Longshoremen's and Harbor Workers' Compensation Act.

Thus, there are presently existing three distinct and separate views by four different United States Courts of Appeals with respect to the liability of employers to third parties under the Longshoremen's and Harbor Workers' Compensation Act.

This conflict was recognized by the United States Court of Appeals for the Second Circuit in two recent cases. In *Slattery v. Marra Bros. Inc.,* 186 F. (2d) 134 (C. C. A. 2d, 1951) that Court reaffirmed the principle of the *Matthews* case, *supra,* and, after considering the *Rothschild* case, *supra,* stated that it could hardly be reconciled with the *Matthews* case. In *Spaulding v. Parry Nav. Co.,* 187 F. (2d) 257 (C. C. A. 2d, 1951) the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer.*

The present uncertainty of the law in the lower federal courts was further demonstrated in the recent case of

* The shipowner in the latter case has recently filed a petition for certiorari with Your Honorable Court (No. 728, October Term, 1950) in which it claims, among other reasons for granting a writ, that said decision is contra to the instant case.

Liberty Mutual Insurance Co. v. Vallendingham, 94 F. Supp. 17 (D. C. D of C. 1950) in which the District Court for the District of Columbia held (contrary to the implications of *Hitaffer v. Argonne Co., supra*) that the aforesaid Act prevented an employer from being subjected to liability for contribution, and dismissed the third-party complaint for contribution on the authority of the *Matthews* case.

2. The decision of the United States Court of Appeals for the Third Circuit in failing to permit contribution between joint tort feasors arising out of a maritime cause of action in proportion of the fault determined by the jury is contrary to the recent expressions of your Honorable Court in the case of *American Stevedores Inc. v. Porello*, 330 U. S. 446 (1947) in which your Honorable Court indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and of the fact that there may be comparative contribution as between joint tort feasors in a case arising out of personal injury.

3. The decision of the United States Court of Appeals for the Third Circuit (assuming, without admitting, that the contribution of the plaintiff's employer cannot be greater than the compensation payments for which it would be liable under the Longshoremen's and Harbor Workers' Compensation Act) fails to set forth any procedure whatsoever whereby the shipowners or operators can liquidate the amount to be recovered from the plaintiff's employer. Furthermore, the ultimate sum to which the employee would be entitled under the Longshoremen's and Harbor Workers' Compensation Act cannot in most cases be determined for a great number of years and, therefore, there can be no certainty or definiteness in arriving at an amount of contribution (assuming that a procedure therefor be established) for which the employer should be responsible.

4. The apparent impracticability of the decision of the Court-below requires not only the review of that decision

but a statement by your Honorable Court setting forth the law to be followed by all federal courts relating to the liability of employers for contribution to joint tort feasors and the procedure for enforcing the same.

It is to the interest both of shipowners and operators and of stevedoring companies (as well as of the maritime trade in general) that these basic and fundamental questions be determined by Your Honorable Court.

Respectfully submitted,

HALCYON LINES AND
VINKE AND COMPANY,
By JOSEPH W. HENDERSON,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 17th day of May A. D., 1951.

HARRISON G. KILDARE,
Notary Public.

(Seal)

My commission expires January 25, 1955.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Case, and Questions Presented see pages 1 to 5 of the Petition.

ARGUMENT.

I. Contribution as Between Joint Tort Feasors Arising Out of a Maritime Cause of Action Should Be in the Proportion of Fault Determined by the Jury and Not Be Limited by the Extent to Which an Employer Might Otherwise Be Required to Pay Compensation to the Plaintiff.

At the trial, the jury, in response to interrogatories, found as a fact that both defendants were negligent and that seventy-five per cent. (75%) of the plaintiff's damages was attributable to his employer, Haenn (Rp. 39, Rr. 173, 174).

On a motion for molding the verdict, the District Court entered judgment against the plaintiff's employer in the amount of $32,500.00, which is fifty per cent. (50%) of the plaintiff's recovery (Rp. 46, Rr. 180).

The United States Court of Appeals for the Third Circuit limited the contribution payable by Haenn to the extent of compensation which Haenn would have been required to pay to the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq. (hereinafter sometimes referred to as the "Act") had the plaintiff not elected to sue the shipowner (R. 183-189).

(a) The Act Does Not Limit the Amount of Contribution to Be Paid by a Joint Tort Feasor in a Maritime Cause of Action.

The United States Court of Appeals for the Third Circuit in this case has taken a legally erroneous position midway between that of the United States Court of Appeals for the Second Circuit, as expressed in *American Mutual Liability Insurance Co. v. Matthews,* 182 F. (2d) 322 (C. C. A. 2d, 1950) and that of the United States Court of Appeals for the Ninth Circuit as expressed in *United States v. Rothschild International Stevedoring Co.,* 183 F. (2d) 181 (C. C. A. 9th, 1950) and of the United States Court of Appeals for the District of Columbia, as expressed in *Hitaffer v. Argonne Co.,* 183 F. (2d) 811 (C. of A. D. of C. 1950) cert. den. 340 U. S. 852.

In *American Mutual Liability Insurance Co. v. Matthews, supra,* it has been held in the Second Circuit that the employer of a plaintiff-longshoresman is not liable for contribution for an injury caused by the mutual fault of his employer and a third party.

In *United States v. Rothschild International Stevedoring Co., supra,* an exactly opposite conclusion was reached. The Court of Appeals for the Ninth Circuit allowed *full* indemnity in favor of the shipowner against the stevedoring company on the ground that its negligence was the active or intervening cause of the plaintiff's injury.

In *Hitaffer v. Argonne Co., supra,* the United States Court of Appeals for the District of Columbia, in a suit by the employer's wife against his employer for loss of consortium, ruled that the Act had no effect upon the common law liability of a stevedore-employer to a third party, even though she be the wife of its employee.

The conflict among the various circuits was recognized by the Second Circuit in the case of *Slatterly v. Marra Bros., Inc.,* 186 F. (2d) 134 (C. C. A. 2d, 1951) in which, after referring to the *Rothschild* case, it held that there

could be no contribution between joint tort feasors when one of them was covered by a state compensation act and that any right of indemnity must exist independently.

See also *Spaulding v. Parry Nav. Co.*, 187 F. (2d) 257 (C. C. A. 2d, 1951) in which the same Court again dismissed a third-party complaint for contribution from the plaintiff's employer and in which case a petition for certiorari has recently been filed with Your Honorable Court (No. 728, October Term, 1950) on the ground, inter alia, that the decision is contrary to the decision in the instant case. Moreover, the rule to be followed in the federal courts has been further confused by the decision of the District Court of the District of Columbia in the case of *Liberty Mutual Insurance Co. v. Valtendingham*, 94 F. Supp. 17 (D. C. D. of C. 1950) which held, notwithstanding the implications of the *Hitaffer* case, *supra*, to the contrary, that the Act prevented an employer from being subjected to liability for contribution.

Circuit Judge Kaufodner in the instant case has properly held that Haenn is liable to Halcyon for contribution notwithstanding the fact that Section 5 of the Act provides that as between employer and employee, "his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer . . . on account of such injury or death" the employer's liability under the Act is exclusive. However, in an apparent desire to fulfil what he terms "the social policy" of the Act, the Court-below, without citing any decision or any provision in the Act, has arbitrarily limited such contribution to the extent of compensation which would otherwise be payable under the Act if the plaintiff had not elected to sue the shipowner. The Court-below conceded "as between the employer and a stranger contributing to the injury of an employee, the Act unquestionably falls short of cover" (R. 186). It also recognizes that "Haenn and Halcyon were, to use the preferable admiralty description, 'mutual wrongdoers,'" and that it would be

inequitable for Halcyon to bear the entire burden merely because Halcyon had the misfortune to injure one within the Act. Nevertheless, the Court below by so-called judicial legislation has limited Halcyon's right of contribution from Haenn without any justification therefor either under the Act or under any decision of this Court or any lower federal court.

Section 5 of the Act, which provides that the liability of an employer shall be exclusive, was enacted for the purpose of making the liability of employer to his employee, or to anyone suing "to recover damages . . . on account of such injury or death", sole and exclusive under the Act; if Congress had intended to include the liability of an employer to a joint tort-feasor, it could have easily done so. The Act is silent as such liability, and in the case where such a third party has sued the employer (as in this case for contribution for a tort caused by their mutual fault for which the jury found that the employer was seventy-five per cent. (75%) responsible) the Act does not proscribe or limit that third person's cause of action. *United States v. Rothschild International Stevedoring Co., supra; Hitaffer v. Argonne Co., supra.* Such third party should, therefore, be entitled to recover contribution without any limitations or restriction from the Act.

Such has also been the holding of various District Courts. *Rederii v. Jarka Corporation,* 26 F. Supp. 304 (D. C. Me. 1939); *The Tampico,* 45 F. Supp. 174 (D. C. W. D. N. Y. 1942); *The S. S. Samovar,* 72 F. Supp. 574, 588 (D. C. N. D. Cal. 1947); *Portel v. United States,* 85 F. Supp. 458, 462 (D. C. S. D. N. Y. 1949).

Finally, the Act itself provides no procedure for determining in advance what in each given case will be the amount of compensation which the stevedore-employer would have ultimately been required to pay if its employee had not elected to sue the third party. In fact, in many cases it will be difficult, and perhaps impossible, to determine such amount for a great number of years. Nor does

the Court-below set forth any procedure to reach the unusual result which it has sought to accomplish in its decision. At best, the determination of such amount is little more than a guess or estimate which might easily be much less than the ultimate amount of liability of the employer under the Act. It seems to us that the Court-below, instead of clarifying the rights and liabilities of joint tort feasors in situations like the instant case, has created further confusion on the subject and has erroneously attempted to establish a rule, unsupported by legislation or case law, which in many cases may be impractical and, in some instances, impossible of application.

(b) Contribution Should Be in the Proportion of Fault as Found by the Jury and Not in the Proportion of Equal Fault as Decided by the District Court.

The only fault attributable to Halcyon is that it failed to inspect and failed to warn Haenn of the alleged defective conditions of the plank. Since Haenn, which specialized in this kind of work, had the free choice of the manner and means of doing it, with no notice to Halcyon of what it intended to do, it is obvious that Haenn's faults are greater in number and are more serious in character.

If the decision of the District Court as to the extent of the contribution be considered as an exercise of discretion in disregarding the jury's finding, this action was an abuse of discretion, and reversible.

It is well established that even though an action be brought at law in a state or in a federal court, admiralty principles will be applied where the cause of action is maritime in character. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 88 (1946); *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239 (1942). The accident in the instant case occurred on board a vessel in navigable waters, and, therefore, admiralty principles are to be applied in this case.

The determination of the correctness of the judgment of the District Court, therefore, depends upon whether as a matter of law, contribution between joint tort feasors in admiralty arising out of damages for personal injury can be awarded only for half of the damages.

This is not a *collision* case, and, therefore, the rule as to damages in collision cases is not applicable but rather the rule of damages in personal injury cases.

The precise question in this case has not been considered or decided by Your Honorable Court, but in *American Stevedores, Inc. v. Porello,* 330 U. S. 446, (1947) Your Honorable Court has indicated a clear recognition of the existence in admiralty of the doctrine of comparative negligence and of the fact that there may be comparative contribution as between joint tort feasors in a case arising out of personal injury.

The concept of comparative negligence is found in early cases in admiralty, particularly in personal injury cases, and was expressly recognized by this Court in *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, 431 (1939). See also *The Explorer* 20 Fed. 135 (C. C. E. D. La. 1884) and *The Max Morris,* 137 U. S. 1 (1890). This doctrine is now firmly imbeded in our admiralty law in cases of personal injury and has been accepted as a well-taken step in the approach toward fairness and justice. *Kreste v. United States,* 158 F. (2d) 575 (C. C. A. 2nd, 1946); *Stokes v. United States,* 144 F. (2d) 82 (C. C. A. 2nd, 1944); *Portel v. United States,* 85 F. Supp. 458 (D. C. S. D. N. Y. 1949); and *Guerrini v. United States,* 167 F. (2d) 352 (C. C. A. 2d, 1948), cert. den. 335 U. S. 843, in which the Court of Appeals in remanding the case for further hearings stated that if liability was found against the defendant, plaintiff's recovery should be reduced to the extent of seventy-five per cent. (75%).

This same consideration applies in situations of contribution between joint tort feasors in a maritime cause of action. The suggestion of contribution by this Court

in the *Porello* case, *supra*, and the award of contribution in *Portel v. United States*, *supra*, is in accord with the principles of admiralty law and should be so applied in the instant case.

The contribution to which Halcyon is entitled in this case is, therefore, seventy-five per cent. (75%) of the judgment paid to the plaintiff, which is the proportion of negligence found by the jury.

Conclusion.

The petitioners' prayer for writs of certiorari should, therefore, be granted.

Respectfully submitted,

JOSEPH W. HENDERSON,
THOMAS F. MOUNT,
GEORGE M. BRODHEAD,
Counsel for Petitioners.

Philadelphia, Pa.
May 17, 1951.